

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION**

**BSC Development Buf, LLC,  
and Connex Construction, LLC,  
A Single Employer<sup>1</sup>**

Employer

and

**Case 3-RC-11769**

**LIUNA, Laborers Local 210**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The parties stipulated that BSC Development Buf, LLC ("BSC") is a New York State limited liability corporation, with its place of business located at the Statler Towers at 107 Delaware Avenue, Buffalo, New York. BSC is engaged in the redevelopment of the Statler Towers building. During the past twelve months, BSC has purchased and received at its Buffalo, New York facility goods, valued in excess of \$50,000, directly from points outside the State of

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<sup>1</sup> The name of BSC Development Buf, LLC appears as amended at the hearing.

New York. Based on the parties' stipulation and the record as a whole, I find that BSC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find, as discussed below, that BSC and Connex Construction, LLC ("Connex")<sup>2</sup> constitute a single employer ("Employer"). I further find that it will effectuate the purposes of the Act to assert jurisdiction herein.

The parties stipulated, and I find, that LIUNA, Laborers Local 210, ("Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act. The Petitioner, in its petition amended at the hearing, seeks a unit including all full-time and part-time general laborers, including construction foremen. The parties also stipulated that these job classifications should be included in any unit found appropriate. Both parties agree that any unit found appropriate should exclude office clerical employees, managers, guards, and all supervisors as defined in the Act.<sup>3</sup> Accordingly, I shall exclude these positions from any unit found appropriate.

At issue is whether the unit sought by the Petitioner constitutes an appropriate bargaining unit. The Employer contends, contrary to the Petitioner, that the only appropriate unit would encompass all the employees it intends to hire in the future in the following job classifications (the approximate number of employees it intends to employ in each classification is noted in

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<sup>2</sup> Connex is an entity established in June 2007 by the sole shareholder and CEO of BSC. At the time of the hearing it employed no other employees. BSC contended at the hearing that all of its current employees at issue would be employed by Connex by August 24, 2007 and that therefore, the petition should be dismissed.

<sup>3</sup> The Petitioner sought, in its petition filed on July 30, 2007, to exclude all office clerical, confidential and professional employees, supervisors, managers, and guards as defined in the Act. The Employer sought a unit that excluded office clerical employees, guards, managers and supervisors. Neither party adduced evidence regarding the professional or confidential status of employees in these job classifications. The parties stipulated that the job classifications of master electrician and master plumber should also be excluded from any unit found appropriate. The record was silent as to the basis of this stipulation.

parentheses): drywallers (15), painters (15), tile setters (15), plasterers (10), carpenters (10), electricians (5), plumbers (5), and welders (2). The only employees currently employed by the Employer are 25 general laborers, 3 construction foremen and 1 plumber. The Employer contends, that by June 2008, it intends to employ a total of 45 general laborers, 5 construction foremen and 76 employees in the other eight listed job classifications. The Employer thus maintains that it would be improper to conduct an election at this time because the unit it asserts is appropriate will be expanding and there is not currently employed a “representative or substantial” complement of employees under Board case law. As discussed below, I find that the unit sought by the Petitioner, which includes all general laborers and construction foremen, constitutes an appropriate unit and that the present complement of employees in these job classifications is “representative and substantial” and thus it is appropriate to direct an election herein.

### **Facts**

BSC bought the Statler Towers, an eighteen floor historical building, located in Buffalo, New York, with the intention of redeveloping it into a multi-use facility. The facility’s design includes a hotel, condominiums, offices and retail establishments, including a restaurant, spa, deli, and market. The employees at issue are currently employed by BSC to perform the construction work required for the building’s redevelopment. The redevelopment is divided into five phases, some of which will be conducted simultaneously. The first phase is demolition; the second phase is renovating the public and retail spaces located in the basement and on the first and mezzanine levels; the third phase is constructing the hotel; the fourth phase is

constructing the condominiums; and the fifth phase is constructing office space.<sup>4</sup> As the hotel is scheduled to open in June 2008, work is currently concentrated on the hotel and the public and retail areas.<sup>5</sup>

Bashar Issa is the Chief Executive Officer (“CEO”) of BSC and its sole shareholder. Issa is in charge of the Employer’s redevelopment project at the Statler Towers and oversees all aspects of the work performed there. Reporting to Issa is David Rycyna, who is head of BSC’s operations division and holds the job title of operations coordinator. Rycyna supervises four operations managers, Patrick Ogiony, Bob Carbone, Brian Conrad and Kyle Racka. The operations managers are responsible for coordinating with architects and engineers in order to plan and schedule the work on the renovations. Each operations manager is responsible for a “package,” i.e., a different part of the renovation. An example of a package is the spa area or fitness facility. In addition to the operations managers, Rycyna supervises construction manager Eric Mayer. Mayer supervises the construction foremen, general laborers, as well as his labor relations assistant, Mark Schmarty.

There are three job classifications, material buyer, property manager and human resources manager, who are not part of the operations division. The material buyer, Justin Sondel, who reports to CEO Issa, researches materials, submits purchasing proposals to Issa and purchases supplies. Supplies are also obtained by operations coordinator Rycyna or the four operations managers. Any purchase over \$200.00 requires CEO Issa’s approval. The property

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<sup>4</sup> The first phase of the redevelopment, which started in May 2007, is scheduled to end in February 2008; the second phase was scheduled to start in July 2007, but is now scheduled to begin in September 2007; and the third phase is scheduled to start in October 2007. Both the second and third phases are scheduled to end in May 2008; the fourth and fifth phases are to begin in the fourth quarter of 2007 and are to end in December 2008. The renovation of the spaces scheduled for July 2007 has not yet begun; however, there has been demolition work performed in these areas.

<sup>5</sup> The specific floors that will be used for the hotel, condominiums and offices are still being determined. It is projected that a total of five to seven floors at the top of the building will be used for condominiums; that a total of five floors of the building will be used for the hotel, including floors nine, ten and eleven. It is also projected that a total of three to five floors will be used for offices, including floors three, four, five and six.

manager, John Gingher, is in charge of leases and has some involvement with employee payroll. Gingher reports directly to Issa. Dr. Susan Fennick is the human resources manager.

In May 2007, BSC began hiring laborers and foremen, and work began on the redevelopment. Operations coordinator Rycyna, along with operations manager Ogiony or construction manager Mayer, interview applicants for positions as general laborers. Human resources manager Fennick is responsible for hiring the applicants.<sup>6</sup>

At the time of the hearing there were 25 laborers and 3 foremen employed by the Employer. The laborers work in a crew and a foreman is assigned to each of the three laborer crews. The laborers are assigned to one of three crews based on the job to be performed. While the record does not disclose the number of laborers that are assigned to each crew, each crew is designated to work on a package and the number of the laborers on a crew varies depending on the package involved.

Currently, only demolition work is being performed for phases one and two of the redevelopment. About 25 percent of the total demolition work has been completed. The demolition work performed by the laborers includes: external demolition, which involves removing the awnings, cleaning the brick, and replacing the façade; and internal tear out, which involves tearing out the walls, carpets, and ceilings down to the bare bones of the structure. The laborers primarily use hand tools, such as sledge hammers and reciprocating saws to perform this demolition work. The laborers also use scaffolding and a fork truck. The tools are secured in construction manager Mayer's office or in storage lockers located on various floors of the building. The tools are unlocked by the foremen, Mayer, or his labor relations assistant Schmarty. The foremen sign out the tools.

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<sup>6</sup> Laborers are constantly being hired in order to replace employees who are leaving.

The laborers and foremen on the three crews work Monday through Friday, either from 7:00 a.m. to 3:30 p.m., or from 8:30 a.m. to 5:00 p.m. They are paid on an hourly basis. The foremen determine the time their crew will start and the start time can vary from day to day. All the laborers, regardless of start time, have a half hour for lunch beginning at 12:00 p.m. The laborers and foremen also punch in and out by means of a hand-scan time clock. The laborers are paid \$8.00 per hour and are eligible for incentive pay based on completing a project early as well as the results and difficulty of the project.<sup>7</sup> Foremen are paid \$9.00 an hour and are eligible for incentive pay. The laborers and foremen may also receive a raise based on construction manager Mayer's recommendation, which is implemented by human resources manager Fennick.<sup>8</sup> The record was silent as to the plumber's terms and conditions of employment other than providing that the plumber's wages are \$10.00 per hour and at times he is eligible for incentive pay.

The laborers and foremen are subject to certain work rules and policies. The laborers may be disciplined by being verbally reprimanded by the foremen, but more serious discipline of both laborers and foremen is issued by construction manager Mayer or operations coordinator Rycyna. Discipline of a more serious nature also involves Fennick, as human resources manager. The laborers and foremen are subject to the provisions of an employee handbook, which they are given upon being hired and for which they sign an acknowledgment stating that they have received it. Although the handbook specifies that employees are to receive certain benefits, including paid vacation time, paid sick days, pay for jury duty, paid bereavement leave

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<sup>7</sup> The amount of incentive pay earned by the laborers and foremen is unclear from the record. The record provides an example in which a crew finished a project early and received \$500.00 in incentive pay, but it was not clear if the crew split this amount or if each member of the crew received \$500.00.

<sup>8</sup> The amount of such raises was not disclosed in the record.

and medical, dental and short-term disability insurance, witness testimony disclosed that the laborers and foremen do not receive these benefits.<sup>9</sup>

In June 2007, CEO Issa created Connex. As with BSC, Issa is the CEO and sole shareholder of Connex. On or about August 24, 2007, all BSC employees, except human resources manager Fennick and property manager Gingher, are scheduled to be transferred to Connex.<sup>10</sup> Fennick will remain in charge of human resources for both BSC and Connex. Upon becoming Connex employees, the laborers' and foremen's wages and working conditions, including supervision, are to remain the same as when they were employed by BSC.

BSC and Connex, in a cooperative effort, will accomplish the redevelopment of the building. BSC is to retain ownership of the Statler Towers. BSC will continue to buy the materials needed for the renovation. The ownership of the existing tools used in the renovation is to be transferred to Connex.<sup>11</sup> Connex is to be responsible for utilizing the materials and manpower needed for the building's renovations.<sup>12</sup> However, as noted above, at the time of the hearing, Connex did not own any materials or supplies and did not have any employees.<sup>13</sup>

As the phases of the redevelopment continue, it is anticipated that additional employees in various job classifications will be hired by Connex. By June 2008, when the hotel is scheduled to open, it is projected that Connex will employ, in addition to a total of 45 laborers and 5

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<sup>9</sup> Mayer testified that these benefits may be given to employees once they become employees of Connex. However, operations manager Ogiony testified the benefits at Connex would remain the same as they currently are at BSC.

<sup>10</sup> Any clerical employees are to remain BSC employees. The record does not disclose the number or job classifications of the clerical employees. The record also does not disclose whether material buyer Sondel will remain with BSC or transfer to Connex.

<sup>11</sup> The record does not establish the means by which the transfer is to occur, and whether the tools will be purchased by Connex or given to Connex. There is no evidence that the transfer is to be accomplished by the terms of a contract between the companies.

<sup>12</sup> The record is silent as to the exact nature of how Connex will utilize the materials and manpower needed for the renovations. The record disclosed that Connex will have a general contractor's license which will allow it to do the construction necessary for the renovation. The record further disclosed that BSC does not have a general contractor's license, but such a license is not needed to do demolition work.

<sup>13</sup> As part of the redevelopment, BSC and Connex, whose offices are located in Suite 780 of the building, will be moved to the building's mezzanine level. Construction manager Mayer's office is already located on the mezzanine level, but he will be moving to a different area of the mezzanine.

foremen, the employees in the following eight specialized classifications: 15 drywallers; 15 painters; 15 tile setters; 10 plasterers; 10 carpenters; 5 electricians; 5 plumbers; and 2 welders. Connex is projected to maintain this level of employment for the two to three years of the building's redevelopment.<sup>14</sup>

The Employer testified that he anticipates that some employees in job classifications other than laborers will be hired in September 2007; however, the record is silent as to the specific classifications that will be hired by that time or how many employees will be hired at each stage of redevelopment between now and June 2008. The Employer testified generally that he intends that the employees in the specialized job classifications will work in crews with a person called a "ganger," who is a laborer acting as a lead person. The crew will work under the overall direction of a foreman. The Employer contends that specialized job classifications are anticipated to work in crews of mixed classifications. However, he did not provide any specific examples of the mixed specialized work crews he intends to employ. Rather he merely speculated that the various specialized employees would work together on mixed crews. The composition of the crews will depend on the "package" being performed. The record does not identify the specific mix of job classifications on these crews, other than providing that laborers will assist the specialized classifications as described below.<sup>15</sup>

The employees in the eight specialized classifications and the laborers assisting them will be constructing new areas of the building rather than just performing demolition work. The drywallers will hang the drywall. The laborers working as assistants to the drywallers will hold drywall, relocate drywall, scaffolding and other materials. The painters will paint the walls of

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<sup>14</sup> The hiring projections were made by CEO Issa in conjunction with construction manager Mayer.

<sup>15</sup> The record disclosed that two examples of the anticipated crew formations intended by the Employer were a tile crew assisted by laborers and a painting crew assisted by laborers. In both examples there is only one specialized classification on the crew and not a mix of the different specialized classifications.



the building. The laborer assistants to the painters will move equipment, such as paint or ladders, and may also paint. The tile setters will set the tiles for the floors and walls in the pool area, hotel and condominiums. The plasterers will repair the plaster walls in the hotel area and on other floors of the building. The carpenters will perform the work of building the newly-constructed areas, such as the condominiums and putting in the kitchens. The electricians will be wiring the building. The plumbers will install new pipes in the building. The welders will install the stairwells. The record does not disclose how the laborers will specifically assist the tile setters, plasterers, carpenters, electricians, plumbers and welders. The Employer also intends that any of the presently-employed laborers with skills in the specialized classifications of drywaller, painter, tile setter, plasterer, carpenter, electrician, plumber and welder will be permitted to transfer to those classifications. However, although the Employer testified that he believed there were some laborers employed who have specialized skills, neither such laborers nor their specialized skills were specifically identified.

The record is silent as to what specific terms and conditions of employment the employees in the eight specialized job classifications will receive. While the wage rates of the eight specialized classifications have not been established, it is anticipated that they will be paid in the range of \$10.00 per hour and be eligible for incentive pay. It is also anticipated that they will be subject to the same employee handbook policies and receive the same benefits as the other employees. As noted above, the Employer intends that the specialized employees will work in crews under the supervision of a foreman.<sup>16</sup>

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<sup>16</sup> It is intended that the crews will continue to work the same hours. However, the tile setters will work at night in order to prevent disruption to the existing tenants.

## **Analysis**

The issues presented are: (1) whether the petition should be dismissed because the current employees of BSC will soon be employed by Connex; (2) whether the petitioned-for bargaining unit of general laborers and foremen is an appropriate unit; and, (3) whether the employee complement in the appropriate unit is sufficiently “representative and substantial,” so as to warrant holding an immediate election.

Based on the record herein and extant Board law, I find that BSC and Connex constitute a single employer under the Act and that the petitioned-for unit of general laborers and foremen is an appropriate unit. I further find that the employee complement is “representative and substantial,” thus warranting the holding of an immediate election.

### **Single Employer**

A “single employer” relationship exists where multiple employing entities are in reality part of a single integrated enterprise. AG Communications Systems Corp., 350 NLRB No. 15, slip op. at 3-4 (2007); Mercy Hospital of Buffalo, 336 NLRB 1282, 1284 (2001); Centurion Auto Transport, 329 NLRB 394, 395 (1999). The Board, in making this determination, considers four factors: (1) common ownership; (2) common management; (3) functional interrelationship of operations; and, (4) central control of labor relations. Centurion Auto Transport, supra, at 395. All of the factors do not have to be present for there to be a single-employer relationship. The relationship is characterized by the absence of an arm’s-length relationship among the non-integrated companies and an essential inquiry is whether there is overall control of critical matters at a policy level. Id. Also critical is whether there is central control over labor relations. Mercy Hospital of Buffalo, 336 NLRB 1282, 1284 (2001).

The record demonstrates that BSC and Connex have a single-employer relationship. The companies have common ownership, as Issa is the CEO and sole shareholder of each entity. They also have common management and labor relations. As the record demonstrates, Issa oversees all aspects of the Statler Tower's redevelopment. He also directly supervises operations coordinator David Rycyna, who is being transferred to Connex and property manager John Gingher who will remain at BSC. Accordingly, the two companies share common management. Dr. Susan Fennick, who will remain employed by BSC, will have responsibility for the human resources functions for both companies.

The operations of both companies are functionally interrelated. BSC will be purchasing the materials and tools used by Connex in the construction work at the Statler Towers. In turn, Connex will provide its services, including manpower, for the construction work. Further, there is an absence of an arm's-length relationship between the two companies. There is no evidence of a contract or sub-contract between the companies for the materials to be provided by BSC or for the services to be provided by Connex. Based on the foregoing, I conclude that the two companies are a single employer under the Act. Thus, I will not dismiss the petition on the basis that BSC will no longer be the Employer of the unit employees once they are transferred to the Connex payroll.

### **Appropriate Unit**

In determining unit appropriateness, the Board need not determine the *only* appropriate unit, the *broadest* unit, or the *most* appropriate unit; the Act requires only that the unit sought be appropriate. See, e.g., Boeing Co., 337 NLRB 152,153 (2001); Home Depot USA, Inc., 331 NLRB 1289, 1290 (2000); Overnite Transportation Co., 322 NLRB 723 (1996); Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964). If the petitioned-for unit is appropriate, then any inquiry

into other appropriate units ends. Dezcon, Inc., 295 NLRB 109, 111 (1989). Accordingly, if the Petitioner seeks a unit that is found to be appropriate, the employer's alternative unit proposals need not be considered. P.J. Dick Contracting, 290 NLRB 150 (1988). Specifically, in the construction industry the Board has found a unit appropriate on the basis of a craft unit, or departmental unit, or so long as the requested employees are a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. Johnson Controls, Inc., 322 NLRB 669, 672 (1996); See also R. B. Butler, Inc., 160 NLRB 1595, 1600 (1966); Del Mont Construction Co., 150 NLRB 85 (1964); Dick Kelchner Excavating Co., 236 NLRB 1414 (1978).

In examining whether the employees are a clearly identifiable and homogeneous group, the Board examines whether a community of interest exists that sets the petitioned-for employees apart from other employees. See, e.g., Boeing Co., *supra* at 153. The Board, therefore, examines factors such as wages; hours of work; employment benefits; nature of supervision; differences in qualifications, training and skills; differences in job functions and amount of time spent away from the plant situs; interchange or contact with other employees; integration with the work functions of other employees; and history of bargaining. See Home Depot USA, *supra*; Boeing Co., *supra*; Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In R.B. Butler, Inc., *supra*, the Board found that a unit comprised solely of laborers in the building and construction industry was an appropriate unit, as they constituted a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. The laborers performed a different type of work from the other employees, which included carpenters, cement finishers and their assistants. The laborers' work involved heavy manual labor requiring no specialized skill. *Id.* at 1596. The carpenters, cement finishers and

their assistants performed the specialized duties of their crafts. Id. The employees in these specialized classifications spent little or no time performing the work of laborers. The laborers received less pay than the specialized employees.<sup>17</sup>

The Board also found a unit appropriate in the construction industry where various classifications of employees in the petitioned-for unit all performed the same work. Mariah, Inc., 322 NLRB 586 (1996). In Mariah, Inc., the petitioned-for wall-to-wall unit of employees was found to be an appropriate unit where the petitioned-for employees all held different craft positions but all performed heating and air conditioning work, which transcended traditional craft boundaries. Id. at 587. They also worked out of the same location with the same supervision. Id. Similarly, where the employees sought to be included in the proposed units did not perform work distinct from the excluded employees, the petitioned-for units were found to be inappropriate. Brown & Root Braun, 310 NLRB 632 (1993). In that case, the Board noted that, in addition to performing the same work, both the petitioned-for employees and excluded employees had the same supervision, worked along side each other, received similar wage rates, worked the same hours, were subject to the same conduct requirements and were eligible for the same benefits. Id. at 635.

Based on the applicable Board law and the evidence adduced at the hearing, I find that the petitioned-for unit of general laborers and foremen is an appropriate unit. The employees sought by the Petitioner constitute a clearly identifiable and homogeneous group with a community of interest separate and apart from the employees in the eight specialized classifications. The employees holding the classifications of laborer or foremen currently

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<sup>17</sup> The Board also determined that traditionally units consisting of only laborers had been represented by the petitioner throughout the United States. The Board further found that it frequently encountered collective-bargaining agreements that covered separate units of laborers and “in recognition of this well established practice has accorded weight to such agreements in work making assignments” in jurisdictional disputes. Id. at 1599 fn. 13.

perform only demolition work requiring no special skills. The other eight classifications will not perform such work and, in fact, each of the eight classifications will perform work requiring different specialized skills. BSC, in its post-hearing brief, acknowledges that employees must have special skills in order to work in the eight other job classifications into which employees will be hired in the future. Furthermore, laborers acting as assistants to the employees in the eight specialized classifications, will not be performing specialized duties, as they do not possess the skills to do so, with the possible exception of some painting work.

There are also other potential differences in the community of interest of the petitioned-for employees and the employees in the eight other classifications. The record indicates that the Employer intends to establish a wage rate for the eight other classifications of approximately \$10.00 per hour. The laborers are paid \$8.00 per hour and the construction foremen are paid \$9.00 per hour. Thus, the employees to be hired in the eight specialized classifications, in all likelihood, will be paid more than the petitioned-for unit employees. The Employer claims that the employees in all the classifications will share a common work situs and have frequent contact. However, the record discloses that crews will work on various packages located on different floors. While the laborers will serve as assistants on these crews, the record does not reveal any evidence that employees in the different specialized classifications will be working together on the crews. For example, there is no evidence title setters will be working with drywallers.

The record also discloses that the Employer intends the eight specialized job classifications to have certain terms of employment in common with the laborers and foremen. They will all undergo the same hiring process, work similar hours, have the same supervision, and be eligible for the same benefits and incentive pay. There is also a certain degree of

functional integration anticipated as each job classification will perform certain duties that will ultimately result in the building being renovated. However, these intended similarities do not mitigate the distinctions that result in the laborers and foremen constituting a clearly identifiable and homogeneous group.

Consistent with finding the petitioned-for unit is appropriate, is the unit determination in A.C. Pavement Striping Co., 296 NLRB 206 (1989), which is cited by BCS for support of its position in its post-hearing brief.<sup>18</sup> In A.C. Pavement Striping Co., it was determined that an appropriate unit of employees of a construction industry employer included both painters and teamsters because, individually, each classification did not constitute a homogeneous grouping of employees with a distinct community of interest. Id. at 209. This determination was, in part, based on the fact that both painters and teamsters in the petitioned-for unit performed the same work. Id. Thus, BSC correctly notes that in A.C. Pavement Striping Co., both painters and teamsters performed the same work. However, it was also determined that no particular skill was needed to perform this work, and that both classifications were assigned to a crew and worked in an integrated process with the same supervision. Id. In the instant case, eight of the ten job classifications that the Employer would include in the unit require specialized training and none of the specialized classifications will be performing the same work. At most, the Employer speculates that some unspecified number of laborers with specialized skills may transfer to one of the eight specialized job classifications or will serve as assistants to employees in the specialized classifications. While the Employer maintains that there will be “mixed” work crews, it did not identify the specific anticipated composition of these crews. Thus, there is no evidence of mixed specialized classifications working together in an integrated process. Unlike

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<sup>18</sup> In A.C. Pavement Striping Co., the Board denied the petitioner’s request to review the Acting Regional Director’s (“ARD”) decision. The Board stated that its denial of review was based on the reasons set forth by the ARD and in doing so stated the ARD properly applied the precedents of the Board.

the employees in A.C. Paving Striping, supra, the laborers in the instant case will not be performing the same work as the employees in the specialized classifications.<sup>19</sup> Conversely, there is no record evidence indicating that the employees in the specialized classifications will be performing laborers' work. These distinctions further demonstrate that the employees in the petitioned-for unit are a homogeneous grouping of employees with a distinct community of interest from the employees in the other eight job classifications.

### **Unit Expansion**

In determining whether the present employee complement is “representative and substantial” so as to warrant holding an immediate election, the Board examines a number of different factors. Jersey Shore Nursing & Rehabilitation Center, 325 NLRB 603, 604 (1998), citing Endicott Johnson de Puerto Rico, Inc., 172 NLRB 1676 (1965). The Board applies a case-by-case approach, examining the relevant factors in each case. The Board generally considers the following factors: the current size of the work force; the number of employees eligible to vote; the size of the expected ultimate employee complement; the amount of time until there is a full work force complement; the rate of expansion, including the timing and size of projected hiring increases until reaching a full complement; the certainty of the expansion; the number of job classifications requiring different skills which are currently filled; the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and the nature of the industry. Toto Industries (Atlanta), 323 NLRB 645, 645 (1997), citing Libbey Glass Division, 211 NLRB 939 (1974); Endicott Johnson de Puerto Rico, Inc., supra; General Cable Corp., 173 NLRB 251 (1968). An examination of these factors is intended to balance the Board's effort to insure “maximum employee

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<sup>19</sup> The only indication on the record of potential common work is the testimony that laborers may do some painting while assisting the painters.



participation in the selection of a bargaining agent, and, permitting employees who wish to be represented as immediate representation as possible.” Clement-Blythe, 182 NLRB 502, 502 (1970).

Concerning the specific nature of the construction industry, the Board in Clement-Blythe, supra, stated that the Board and Congress “recognized the need in this industry for permitting the collective-bargaining process to begin as early as possible, so as to accommodate the fluctuating nature and unpredictable duration of construction activities.” Id. at 502. The Board stated in that case that there is “more emphasis in the construction industry to the desirability of an early choice given to the employees than to postponing an election in order to achieve a full employee complement.” Id. at 503. The Board found the employee complement to be “representative and substantial” where 43 of the anticipated 143 employees were employed and they represented at least 50 percent of the classifications to be hired. Id.

Similarly, the Board found in Toto Industries (Atlanta), supra, a sufficient employee complement where approximately 51 percent of the total number of employees expected to be hired were currently employed. Id. at 645-646. The current employee complement also represented all the job skills or classifications that would be included in the unit. Id. at 645.

As I have found a unit limited to laborers and foremen to be appropriate, in the unit found appropriate herein, the current employee complement at issue consists of 25 general laborers and 3 foremen. It is anticipated that the unit will expand by June of 2008 to a total of 45 laborers and 5 foremen. Thus, the overall unit will increase from 28 employees to 50 employees. The current complement of employees represents 56 percent of the total number of anticipated employees and 100 percent of the job classifications included in the unit found appropriate. As there is no schedule as to when additional laborers and foremen will be hired, the rate of expansion cannot

be considered. However, the record indicates that the expansion is relatively certain as the phases of the redevelopment progress. Based on these factors, I find that the employee complement is representative and substantial so as to warrant an immediate election.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time general laborers, including construction foremen, employed by the Employer at its facility located at 107 Delaware Avenue, Buffalo, New York; excluding all master electricians, master plumbers, drywallers, painters, tile setters, plasterers, carpenters, electricians, plumbers and welders, office clerical employees, guards, and all professional employees and supervisors as defined in the Act.

There are approximately 28 employees in the unit herein found appropriate.

#### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **LIUNA, Laborers Local 210**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

#### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **September 20, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to

file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website [www.nlr.gov](http://www.nlr.gov),<sup>20</sup> by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

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<sup>20</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **September 27, 2007**. The request may be filed electronically through the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>21</sup> but may not be filed by facsimile.

**DATED** at Buffalo, New York this 13<sup>th</sup> day of September 2007.

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**HELEN MARSH**, Regional Director  
National Labor Relations Board  
Region Three  
130 South Elmwood Ave., Suite 630  
Buffalo, New York 14202

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<sup>21</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).